Supreme Court, U. S.
FILED
MAR 1 1977
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-539

DAYTON BOARD OF EDUCATION, et al.,

Petitioners,

v.

MARK BRINKMAN, et al.,

Respondents.

BRIEF OF AMICUS CURIAE OHIO STATE BOARD OF EDUCATION AND STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

ARMISTEAD W. GILLIAM, JR.
CHARLES J. FARUKI
SMITH & SCHNACKE
390 Talbott Tower
Dayton, Ohio 45402

Attorneys for Amicus Curiae

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

TABLE OF CONTENTS

		Page
I.	INTEREST OF AMICUS CURIAE	1
II.	ARGUMENT:	5
	THE IMPOSITION OF A SCHOOL DISTRICT-WIDE RACIAL BALANCE REMEDY EXCEEDED THE REMEDIAL POWERS OF A FEDERAL COURT BY IMPOSING THE REQUIREMENT THAT EACH AND EVERY SCHOOL WITHIN THE SYSTEM MUST HAVE A BLACK-WHITE PUPIL RATIO EQUAL TO THAT OF THE DISTRICT AS A WHOLE, PLUS OR MINUS 15%.	
	A. The Scope Of The Remedy Ordered By The Federal Courts May Not Exceed The Nature Of The Violation.	6
	B. The Requirement That The Schools In The Dayton School System Each Have A Student Population Consistent With The Black-White Ratio Of The District As A Whole Is Improper.	9
III.	CONCLUSION	12

CITATIONS

CASES: Page

Austin Independent School District v. United States, No. 76-200, 45 U.S.L.W. 3413 ..... 7, 10
Brinkman v. Gilligan, 503 F.2d 684 (6th Cir. 1974) 5
Brinkman v. Gilligan, 518 F.2d 853 (6th Cir. 1975) 6
Brinkman v. Gilligan, 539 F.2d 1084 (6th Cir. 1976) 6, 11
Keyes v. School District No. 1, 413 U.S. 189 (1973) 7
Milliken v. Bradley, 418 U.S. 717 (1974) 7, 9, 10, 12
North Carolina State Board of Education v. Swann, 402 U.S. 43 (1971) 9
Pasadena City Board of Education v. Spangler, 49 L.Ed. 2d 599 (1976) 4, 9, 10, 11, 12
San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) 3
Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) 6-7, 9, 11, 12
Village of Arlington Heights v. Metropolitan Housing Development Corp., No. 75-616, 45 U.S.L.W. 4073 (1977) 7
Washington v. Davis, 426 U.S. 229, No. 74-1492, 44 U.S.L.W. 4789 (1976) 7

STATUTES:

28 U.S.C. § 1712 5
Ohio Rev. Code Chapter 3317 3

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-539

DAYTON BOARD OF EDUCATION, et al.,
Petitioners,

v.

MARK BRINKMAN, et al.,
Respondents.

BRIEF OF AMICUS CURIAE OHIO STATE BOARD OF EDUCATION AND STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

I. INTEREST OF AMICUS CURIAE

On December 24, 1975, a motion was filed in the District Court by the Petitioner Dayton Board of Education ("Dayton Board") to require the state defendants[1] to pay a por-

[1] Both the Amicus Curiae, the Ohio State Board of Education and the Ohio State Superintendent of Public Instruction, and the other state defendants, the Governor of Ohio and the Ohio Attorney General, have been named defendants in this case since it was filed. However the District Court severed the issue of the state defendant's liability from the issue of whether the acts of the Petitioner Dayton Board created segregated educational facilities in violation of the Equal Protection Clause of the Fourteenth Amendment. (R. 4-5; February 7, 1973 Findings of Fact and Memorandum Opinion of Law, p. 1.)

tion of the costs incurred in implementing the desegregation plan. Aside from the serious Eleventh Amendment issues presented by such a motion, the Amicus Curiae have an interest in the instant appeal because they are being asked to pay several million dollars in implementing the remedial plan ordered by the District Court.

In a supplemental memorandum filed in the District Court March 4, 1976, the Petitioner itemized the costs it sought from the Amicus Curiae State Board of Education. These costs totaled $7,831,080.00.[2] The Petitioner Dayton Board has represented that it is unable to fund these costs from its budget. The Dayton Board has apparently rejected the possibility of asking the voters to approve a tax increase for the purpose of raising funds for desegregation; the likelihood of passage of such a tax levy is small.

The Amicus Curiae are party defendants to similar desegregation suits pending in District Courts in Cleveland (where desegregation plans have been submitted to the court after trial), Youngstown, Columbus, and Cincinnati, Ohio. The state defendants in each of these cases have been or may be asked to pay a portion of the costs incurred in implementing any plans ordered by the courts. Since the state defendants have no control over the appropriation of monies, payment from available funds of the many millions of dollars involved in plans in which the remedy ordered exceeds the nature of the violation would effectively destroy the Ohio statutory formulas of school financing. The primary casualty of these enormous monetary demands would be the Ohio School Foundation Program, the principal means of financing the operation of Ohio's public schools. The program is based upon statutory formulas

[2] "Supplemental Memorandum of Defendant Dayton Board of Education Relating to Motion to Pay Portion of Cost." These costs included such items as increased transportation costs.

enacted by the Ohio General Assembly to distribute to all school districts funds for the operation of Ohio's public schools. Ohio Rev. Code Chapter 3317. Ohio's statutory system of public school finance is similar to the Texas system upheld in *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1 (1973). Indeed, *Rodriguez* recognized that the Texas school financing system had a "counterpart in virtually every other state," 411 U.S. at 17. *See also* 411 at 56 n.111.

These statutory formulas do not give the Amicus Curiae any discretion to allocate funds as the Amicus Curiae wish. For example, for the school year 1975-1976, the Ohio General Assembly appropriated $962,254,763.00 for the Ohio School Foundation Program. This entire amout was distributed to various school districts under the formulas in the above-cited statutes.[3] The state defendants are without discretion over any money to pay for "desegregation costs."

An order that the state defendants share in the cost of implementing a desegregation plan would require them to violate both the School Foundation Program's statutory formulas and the terms of appropriation bills of the Ohio General Assembly, which specify the purposes for which appropriated money may be used. Even if the state defendants used money properly allocated under these formulas to other school districts, in order to fund the Dayton desegregation plan, the other school districts would be receiving far less money than was appropriated for them. The other school districts would then be deprived of necessary operating funds.

[3] Page 4 of Exhibit A to Supplemental Memorandum of State Defendants, in Opposition to Motion of Dayton Board to Require State to Pay Portion of Costs, filed June 4, 1976 in the District Court.

In order to maintain the district-wide fixed racial balance remedy ordered by the District Court in this action, much money is required to transport students through the Dayton City School District. If the Sixth Circuit's order of such an expensive plan in Dayton is upheld, the Amicus Curiae could be asked to pay for any similar plans in other Ohio cities.

The gravity of this problem for the state defendants is that the law requires implementation of these costly remedial orders while an appeal is taken from the trial court's judgment. *See Pasadena City Board of Education* v. *Spangler,* 49 L.Ed. 2d 599, 610 (1976). Many millions of dollars may be spent from the public coffers by defendants in desegregation cases in implementing plans later modified or eliminated on appeal. This Court should give the lower courts some affirmative guidelines for granting stays of remedial orders that involve as much expense and disruption of a school district's operations as does the order in the instant action.

In addition, this Court's decision in this case is important to the Amicus Curiae because the District Court has yet to consider the issues on the merits as to the state defendants.[4] In the first appeal to the Sixth Circuit, the Court of Appeals ordered that the state defendants should not be dismissed from this action, stating in part:

> "The District Court is directed to keep the State defendants as parties to this action . . . . Since an Ohio Attorney General's opinion dated July 9, 1956, the State Department of Education has known that it has an affirmative duty under both Ohio and federal law to take all actions necessary, including, but not limited to, the withholding of state and federal funds, to prevent and eliminate racial segregation in

[4] *See* footnote 1, *supra.*

> the public schools." *Brinkman* v. *Gilligan,* 503 F. 2d 684, 704 (6th Cir. 1974).

If the Sixth Circuit's requirement of racial balance in every school is upheld, the Amicus Curiae would be faced with the claim that every urban school in Ohio must have a similar black-white student ratio.

II. ARGUMENT

THE IMPOSITION OF A SCHOOL DISTRICT-WIDE RACIAL BALANCE REMEDY EXCEEDED THE REMEDIAL POWERS OF A FEDERAL COURT BY IMPOSING THE REQUIREMENT THAT EACH AND EVERY SCHOOL WITHIN THE SYSTEM MUST HAVE A BLACK-WHITE PUPIL RATIO EQUAL TO THAT OF THE DISTRICT AS A WHOLE, PLUS OR MINUS 15%.

This brief is directed to the first and second questions presented in the Petition for a Writ of Certiorari. Those two questions are:

1. Does the imposition of a district-wide recial balance remedy exceed the remedial and equitable powers of a federal court and does such imposition violate 28 U.S.C. § 1712, where, although isolated segregative practices have been found to exist, it has been affirmatively determined that the Board of Education has at no time maintained a dual system?

2. Is a judicial decree valid which requires a fixed racial balance for each and every school in the system?

Although isolated instances of practices having a segregative effect were shown, the unreversed finding of the District Court is that the Petitioner Dayton Board never maintained a dual system of education. Yet the United States Court of Appeals for the Sixth Circuit has mandated a desegregation plan requiring racial balance "in as many of the remaining racially identifiable schools in the Dayton System as feasible." *Brinkman* v. *Gilligan*, 518 F. 2d 853, 857 (6th Cir. 1975). Following this direction of the Sixth Circuit, the District Court on December 29, 1975 decreed that the petitioner Dayton Board could adopt any plan provided that each school in the Dayton System was "desegregated." "Desegregated" was defined as requiring each school in the system (not including grades 11 and 12 for the academic years 1976-1978) to have a pupil population that reflected, within plus or minus 15%, the racial composition of the district as a whole. The Sixth Circuit approved this plan, *Brinkman* v. *Gilligan*, 539 F. 2d 1084, 1086 (6th Cir. 1976).

The District Court's December 29, 1975 order did not itself contain a plan or approve a specific plan that encompassed the 15% requirement. Rather, the District Court left the parties to devise a plan so long as the ultimate end, the fixed racial balance ratio in every school, was maintained.

A. The Scope Of The Remedy Ordered By The Federal Courts May Not Exceed The Nature Of The Violation.

With respect to the remedies to be ordered by the federal courts in desegregation cases, it is well established that: "As with any equity case, the nature of the violation determines the scope of the remedy." *Swann* v. *Charlotte-*

Mecklenburg Board of Education, 402 U.S. 1, 16 (1971).[5] This principle was reaffirmed in *Milliken* v. *Bradley*, 418 U.S. 717, 738, 744 (1974). *See also* the opinion of Mr. Justice Powell, concurring in the per curiam order of this Court vacating and remanding the judgment in *Austin Independent School District* v. *United States*, No. 76-200, 45 U.S.L.W. 3413: "I merely emphasis the limitation repeatedly expressed by this Court that the extent of an equitable remedy is determined by and may not properly exceed the effect of the Constitutional violation."

In the instant case this Court is not faced with a dual school system. The District Court found that the attendance zones, school site selection and construction actions, and the freedom of enrollment system of the Petitioner Dayton Board were not segregative in either their purpose or their effects. February 7, 1973 Findings of Fact and Memorandum Opinion of Law, pp. 5-8 and 9-10. The District Court's specific holding is rather that the existance of racially imbalanced schools, optional attendance zones, and 1972 rescission by the Dayton Board of resolutions which would have promoted integration were cumulatively in violation of the Equal Protection Clause.

---

[5] This principle of the remedy being limited by the scope of the violation is especially important in light of the absence on the record before this Court of evidence of a purpose or intent to segregate students on the basis of race. *See Keyes* v. *School District No. 1*, 413 U.S. 189, 208 (1973) (the distinguishing factor between *de jure* segregation and *de facto* segregation is purpose or intent to segregate); *Washington* v. *Davis*, 426 U.S. 229, No. 74-1492, 44 U.S.L.W. 4789, 4792 (1976) (proof of a racially discriminatory purpose is essential to an equal protection violation, and the fact that "there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause."); *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, No. 75-616, 45 U.S.L.W. 4073, 4077 (1977) (disproportionate impact is not sufficient; evidence of "racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.").

The District Court recognized that the majority of optional zones had no racial significance at the time of their creation,[6] were scattered throughout the system (R. 1629), and were located so as to be equal distances from the two schools which they served (R. 1606). Standards of access, safety, school capacity, convenience and prior patterns of attendance were the criterial governing the establishment of optional zones (R. 1878). The racial imbalance existing in the schools within the Dayton School District was a result of the fact that the student populations were racially imbalanced "consistent with the black-white population and geographical distribution" as shown by census figures.[7]

In the absence of a finding that the Petitioner Dayton Board was responsible for this black-white population and geographical distribution, the remedy requiring a balancing of the races in Dayton's schools exceeded the scope of the single cumulative violation made out by the Respondents.

---

[6] Finding 11, February 7, 1973 Findings of Fact and Memorandum Opinion of Law, p. 8.

[7] Finding 4, February 7, 1973 Findings of Fact and Memorandum Opinion of Law, p. 5.

B. The Requirement That The Schools In The Dayton School System Each Have A Student Population Consistant With The Black-White Ratio Of The District As A Whole Is Improper.

Swann v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 22 *et seq.* (1971) dealt with the problem of racial balances or racial quotas. This Court made plain that even in the context of dismantling dual school systems, 402 U.S. at 22, the requirement to desegregate schools "does not mean that every school in every community must always reflect the racial composition of the school system as a whole." 402 U.S. at 24. *Swann* held that there was no constitutional right to "any particular degree of racial balance or mixing," 402 U.S. at 24. *See also North Carolina State Board of Education* v. *Swann*, 402 U.S. 43, 46 (1971).

More recently this Court declared in *Milliken* v. *Bradley*, 418 U.S. 717, 740-741 (1974) "that desegregation, in the sense of dismantling a dual school system, does not require any particular racial balance in each "school, grade or classroom." Milliken then cautioned that "the use of significant racial imbalance in schools within an autonomous schaal district as a signal which operates simply to shift the burden of proof, is a very different matter from equating racial imbalance with a constitutional violation calling for a remedy." 418 U.S. at 741 n.19. In the instant case the District Court did find racial imbalance in the schools within the Dayton City School System. However, the District Court expressly found that this racial imbalance was consistent with the black-white population and geographical distribution of that population in the City of Dayton.[8]

---

[8] This Court has long recognized that local school boards have no control over the demographics within their school system, or the shifting of populations and residential patterns within a city or metropolitan area. *Pasadena City Board of Education* v. *Spangler*, 49 L. Ed. 2d 599, 608

To say this racial imbalance in pupil attendance in the schools must be remedied by the Dayton Board contravenes this Court's holding in *Milliken* v. *Bradley*.

Since (as shown in Section A above,) the scope of the remedy is limited by the nature of the constitutional violation, and since the Petitioner Dayton Board cannot be responsible for the geographical distribution of the population in the Dayton area which caused the racial imbalance in Dayton's schools, the remedy imposed upon the Dayton School District by the lower federal courts in this case is excessive.

This Court has considered a similar situation in *Pasadena City Board of Education* v. *Spangler*, 49 L. Ed. 2d 599 (1976), which held that the District Court could not require the Pasadena School District to rearrange its attendance zones annually so as to perpetually insure a racial mix in the schools. *Spangler* stated the District Court had improperly contemplated "the 'substantive constitutional right [to a] particular degree of racial balance or mixing' which the Court in *Swann* expressly disapproved." 49 L. Ed. 2d at 607. *Spangler* reaffirmed the principle of *Swann* that mathematical ratios are "no more than a starting point in the process of shaping a remedy," 402 U.S. at 25, reaffirmed in *Pasadena City Board of Education* v. *Spangler*, 49 L. Ed. 2d at 607.

"The plan approved in this case applied in general terms to all Pasadena schools," *Spangler*, 49 L. Ed. 2d at 608. Similarly, the order in the instant case applied the 15% racial balance ratio to all Dayton schools (except that high

---

(1976). *See also* the opinion of Mr. Justice Powell concurring in *Austin Independent School District* v. *United States*, No. 76-200, 45 U.S.L.W. 3413 (1976): "the principal cause of racial and ethnic imbalance in urban public schools across the country — North and South — is the imbalance in residential patterns. Such residential patterns are typically beyond the control of school authorities."

school students already enrolled in a specific high school could graduate from that school during school years 1976-1977 and 1977-1978). By ordering that no school in the Dayton School District shall have a black-white student ratio different from that of the district as a whole, the lower courts guaranteed and enforced a right to a particular degree of racial balance and mixing. Such a right was disapproved in *Swann* and *Spangler, supra.*

The Sixth Circuit stated that the District Court's opinion of December 29, 1975 "does appear to create a right that the federal courts have never recognized." *Brinkman* v. *Gilligan*, 539 F.2d 1084, 1087 (6th Cir. 1976). The Sixth Circuit then said that the language of the District Court creating such a right "does not appear in the judgment, which is the instrument this Court review on appeal." 539 F.2d at 1087. Without considering *Swann* or *Spangler* on this point, the Court of Appeals chose to interpret the action of the District Court in creating such a new constitutional right as necessary in order "to eliminate the vestiges of past discrimination," 539 F.2d at 1087.

III. CONCLUSION

The imposition of a fixed, district-wide racial balance elevates the requirement of racial mixing to the level of a constitutional right, in contravention of *Swann*, *Milliken*, and *Spangler, supra*. Since racial imbalance is not a constitutional violation, a remedy imposing such a requirement exceeds the scope of the violation in this action.

Respectfully submitted,

ARMISTEAD W. GILLIAM, JR.
CHARLES J. FARUKI
SMITH & SCHNACKE

390 Talbott Tower
Dayton, Ohio 45402

Attorneys for Amicus Curiae